No. 03-109

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

MONTANA WILDERNESS ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit's decision in this case, like the Tenth Circuit's recent decision in *Southern Utah Wilderness Alliance* v. *Norton*, 301 F.3d 1217 (2002), presents an important and recurring question concerning the scope of 5 U.S.C. 706(1): whether that provision of the Administrative Procedure Act (APA) authorizes judicial review of the adequacy of an agency's day-to-day management of public lands for compliance with general statutory standards. The federal parties have asked that their petition for a writ of certiorari in this case be held pending the Court's disposition of the previously filed petitions in *Norton* v. *Southern Utah Wilderness Alliance*, No. 03-101, and *Utah Shared Access Alliance* v. *Southern Utah Wilderness Alliance*, No. 02-1703, and then disposed of accordingly.[*]

[*] The intervenors below have also filed a certiorari petition, which they ask the Court to hold pending its disposition of *Southern Utah* or alternatively to grant. Pet. 10-11, *Blue Ribbon*

1. Respondents Montana Wilderness Association, Inc., et al. (MWA), do not offer any substantial reason to depart from that settled approach when cases presenting the same question are before the Court at the same time. MWA does not suggest, for example, that a decision of this Court in the *Southern Utah* case would not be controlling for the Section 706(1) claims in this case. Cf. Br. in Opp. 3 ("[T]he District Court and the Ninth Circuit here will follow whatever rulings this Court may make concerning the scope of judicial review under § 706(1).").

MWA suggests only that, because "[t]his case has been pending since 1996," the parties should proceed immediately to "further factual development"—*i.e.*, a trial—in the district court notwithstanding any grant of certiorari in *Southern Utah*. Br. in Opp. 3. The proceedings contemplated by MWA would prove unnecessary, however, if this Court reverses the Tenth Circuit's judgment in *Southern Utah*. There is no reason to impose the burdens of such proceedings on the parties and the district court at this juncture, especially since a trial de novo in the district court would constitute a substantial departure from proper procedure under the APA. Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) (describing narrow circumstances in which de novo review is permissible under the APA).

2. In addition, MWA repeats, often verbatim, the reasons offered by the respondents in *Southern Utah* for denying certiorari in that case. Those reasons are refuted in the federal petitioners' reply brief in No. 03-101, copies of which are being provided to MWA's

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Coalition v. *Montana Wilderness Ass'n*, No. 03-123 (filed July 22, 2003).

counsel (some of whom are also respondents' counsel in *Southern Utah*). As explained in the government's certiorari petition (at 11-12, 17-18, 19-20, 25-27) and reply brief (at 4-6) in *Southern Utah*, the Tenth Circuit's decision in that case and the Ninth Circuit's decision in this case cannot be reconciled with this Court's decision in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990), and conflict with the Fifth Circuit's en banc decision in *Sierra Club* v. *Peterson*, 228 F.3d 559 (2000), cert. denied, 532 U.S. 1051 (2001).

The Ninth Circuit's decision here not only confirms the need for this Court's prompt clarification of the scope of Section 706(1), but also underscores a central deficiency in the holdings in this case and *Southern Utah*. The Ninth Circuit correctly held that MWA could not assert a challenge under 5 U.S.C. 706(2) to the adequacy of the Forest Service's day-to-day maintenance and improvement work in the wilderness study areas for compliance with the general statutory requirement "to maintain [the areas'] presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, § 3(a), 91 Stat. 1244. The court of appeals explained that such ongoing programmatic activity "does not fit into any of the statutorily defined categories for agency action" under the APA, and is not "final" action that "mark[s] the consummation of the [Forest Service's] decisionmaking process." Pet. App. 6a-7a (brackets in original) (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177 (1977)).

Yet, the Ninth Circuit held that those same activities, as well as the Forest Service's management of the wilderness study areas more generally, could be reviewed under Section 706(1), despite MWA's failure to

direct its challenge to any discrete "agency action," much less "final agency action," that is mandated by the Montana Wilderness Study Act but that has been "unlawfully withheld" by the Forest Service. See Pet. App. 8a-9a. Indeed, the court remanded the case for a "trial" on the open-ended question "whether the Forest Service has discharged its duty to administer the Study Areas so as to maintain their wilderness character and potential for inclusion in the Wilderness System." *Id.* at 10a; see *id.* at 11a. Such a trial de novo is fundamentally inconsistent with the framework for judicial review under the APA, which provides for review on the merits of an issue only following the agency's rendering of a decision on a discrete matter, on the basis of a record that the agency has compiled, and under the deferential arbitrary and capricious standard.

Thus, if MWA believed that the Forest Service should have taken a particular final agency action to comply with the Montana Wilderness Study Act, MWA was first required to petition the agency to do so. And, if the Forest Service failed to respond to the petition in a reasonable time, MWA could bring an action under Section 706(1) to compel the Forest Service to do so. The Ninth Circuit plainly erred in allowing MWA to bypass that orderly procedure and bring a wholesale challenge directly in district court. In particular, there is no basis in the APA to give the term "agency action" a different meaning in Section 706(1) than in Section 706(2), or to apply Section 704's limitation of judicial review to "final agency action" only to claims under Section 706(2) and not to claims under Section 706(1). To the contrary, the understanding that Section 706(1), like Section 706(2), applies only to "final agency action" is essential to protect against wide-ranging judicial

intervention into the ongoing administration of a program by the Executive Branch, and thereby confine the federal courts to their intended role under the APA and under the separation of powers prescribed by the Constitution.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of *Norton* v. *Southern Utah Wilderness Alliance*, No. 03-101, and *Utah Shared Access Alliance* v. *Southern Utah Wilderness Alliance*, No. 02-1703, and then disposed of accordingly.

Respectfully submitted.

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